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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1915

LESTER L. PERKINS, D.V.M.,

Appellant,

—v.—

HOWARD SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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Pursuant to Rule 16(4) of the Court's Rules, the Appellant submits this brief in opposition to the Motions to Affirm filed by the respective federal and state officials, Appellees herein.

The ultimate issue in this case is whether the federal and state governments may totally exclude from eligibility for jury service all persons who, though meeting all other statutory requirements, are not citizens of the United States. The substantial question which resolution of this issue involves turns on whether this flat prohibition on eligibility for jury service by resident aliens is demonstrably more compelling and necessary than similar prohibitions against aliens practicing law, In Re Griffiths, 413 U.S. 717 (1973), or serving as state employees, Sugarman v. Dougall, 413 U.S. 634 (1973). Nothing in the respective Motions to Dismiss demonstrates that this question is anything but substantial.

The Appellees, like the three-judge court below, correctly characterize the jury system as an important institution of our system of government, but incorrectly proceed to the conclusion that, accordingly, resident aliens may automatically be excluded from that process.

In leaping to that conclusion, the Appellees fail to demonstrate that there is a necessary connection between jury service and citizenship and fail to indicate how the justifications for the exclusion accepted by the court below to support that connection differ in any significant respect from the rationales offered but rejected in Sugarman, and more particularly in Griffiths.

Similarly, the Solicitor General relies heavily on language in Sugarman indicating limits to the reach of that decision. In Sugarman, the Court suggested two areas from which the exclusion of resident aliens might not be invalid, because of the State's power "to preserve the basic conception of a political community." 413 U.S. at 647 (quoting from Dunn v. Blumstein, 405 U.S. 330, 344 (1972). The Court indicated that citizenship might be a factor in setting the qualifications for voting and also in establishing eligibility criteria for "persons holding state elective or important non-elective executive, legislative, and judicial positions," because they "perform functions that go to the heart of representative government." 413 U.S. at 647.

But the Sugarman dictum is equally important for what it did not say. Conspicuously absent from the list was any reference to jury service as an aspect of participation in the political community. This omission places in a different light the dictum in earlier cases suggesting that jury service could constitutionally be limited to citizens. E.g., Carter v. Jury Commissioners, 396 U.S. 320, 332 (1970). By the same token, the omission of jury service from the Sugarman discussion of functions related to participation in the political community makes it even more important that the clash between the principles applied in Sugarman and Griffiths and those employed by the court below be reconciled by this

Court only after plenary consideration.

CONCLUSION

For the reasons set forth herein, jurisdiction should be noted.

Respectfully Submitted,

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